STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 98 B 146

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DONALD THOMPSON,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,
DIVISION OF FACILITIES MANAGEMENT,

Respondent.

THIS MATTER was heard in evidentiary hearing before Administrative Law Judge Michael S. Gallegos, on September 17, 1998, 1998 at 1525 Sherman Street, Room B-65, Denver, Colorado. Respondent was represented by Assistant Attorney General Stacy L. Worthington. Complainant appeared and was represented by Ms. Vonda G. Hall, Attorney at Law.

MATTER APPEALED

Complainant appeals a disciplinary two (2) step reduction in pay for a period of six (6) months. For the reasons set forth below, Respondent is affirmed.

PREHEARING MATTERS

1. Witnesses

a. One witness, Mr. John Cannedy, was sequestered throughout hearing.

b. Respondent called the following witnesses in support of its' case: Mr. John Cannedy, Plant Maintenance Supervisor, Division of Facilities Management, Western Region; Mr. Rodney Sessum, Facilities Manager, Division of Facilities Management, Western Region and appointing authority in this matter.

c. Complainant called the following witnesses, who gave testimony via telephone, in support of Complainant's case: Mr. Bill Bever, Senior Employee Representative, Colorado Association of Public Employees (C.A.P.E.); Mr. Mark Peck,

Carpenter I, Grand Junction Regional Center; Mr. James "Jim" Cook, Staff Electrician, Grand Junction Regional Center.

Complainant also testified on his own behalf.

2. Exhibits

a. The parties stipulated to the admission into evidence of Complainant's Exhibits A and B. Complainant's B is a letter which bears an incorrect date: The date indicated on Complainant's Exhibit B, April 15, 1997, is a typographical error. The date should read April 15, 1998.

b. Complainant's Exhibit C was accepted into evidence over Respondent's objection, for the limited purpose of impeachment.

c. The parties stipulated to the admission into evidence of Respondent's Exhibit 1 which is the same document as Complainant's Exhibit A.

d. Respondent's Exhibit 2, a transcript of the second R833 meeting in this matter On April 13, 1998, was accepted into evidence over the objection of Complainant.

e. Respondent's Exhibits 3, 4, 5 and 6 were offered and accepted into evidence without objection from Complainant.

f. Respondent's Exhibit 7, a transcript of the first R833 meeting held in this matter on March 13, 1998, was admitted, over Complainant's objection, for the limited purpose of impeachment.

ISSUES

1. Whether Complainant committed the act(s) which gave rise to the disciplinary action.

2. Whether Complainant's action(s) warranted the disciplinary action imposed.

3. Whether Respondent's action(s) were arbitrary, capricious or contrary to rule or law.

4. Whether Complainant is entitled to costs including attorney's fees.

FINDINGS OF FACT

1. Complainant is a Maintenance Mechanic I at the Grand Junction Regional

Center, within the Division of Facilities Management, Western District. He has worked 9 (nine) years at the Grand Junction Regional Center, the last 6 (six) years working in building maintenance. Complainant likes his work.

2. Complainant received no corrective or disciplinary actions and no "Needs Improvement" ratings on his evaluations prior to November 1997, at which time he got a new supervisor.

3. In November 1997 Mr. John Cannedy became Complainant's supervisor. Mr. Cannedy supervises 14 (fourteen) employees, including 4 (four) maintenance mechanics. Immediately prior to becoming a supervisor, Mr. Cannedy worked as a plumber at the Grand Junction Regional Center.

4. Mr. Cannedy was selected to be supervisor by Mr. Rodney Sessum, Facilities Manager, Division of Facilities Management, Western District, including the Grand Junction Regional Center. Mr. Sessum became the Facilities Manager, and appointing authority, for the Grand Junction Regional Center (GJRC) in November 1997. His duties include: maintenance of the buildings and budget for Western District facilities and insuring that the buildings are cleaned safely. Mr. Sessum's experience, prior to his appointment as Facilities Manager for the Western District in November 1997, was as Facilities Manager for the Division of Facilities Management, Southern District.

5. One of the reasons Mr. Sessum chose Mr. Cannedy to be a supervisor at the GJRC was that, upon his arrival at GJRC, Mr. Sessum observed that employees at the GJRC had become two separate factions, opposing sides, and Mr. Cannedy appeared to align himself with neither side.

6. Mr. Sessum believed it was necessary to create a more cooperative working environment in order to foster a more efficient operation and that choosing a supervisor non-aligned (with either faction) would produce a more cooperative working environment.

7. Mr. Sessum believes that the quality and quantity of work at the Grand Junction Regional Center have improved since he took over as Facilities Manager.

8. Complainant and other GJRC employees, including Mr. Mark Peck and Mr. Jim Cook, believe that after Mr. Cannedy became supervisor there was a "Good guy/bad guy" attitude and atmosphere. Complainant believes he was placed in the 'Bad guy" category because he did not necessarily agree with some of the procedures instituted when Mr. Sessum took over.

9. On several occasions Mr. Sessum asked Complainant to resign. However, when Complainant asked Mr. Sessum to stop asking him to resign, Mr. Sessum did so.

10. Complainant believed that management was trying to "get rid *of*" him (make him quit), so he filed an age discrimination claim against his supervisors with the Colorado Civil Rights Division in Grand Junction, Colorado.

11. Complainant believes he was harassed by management, followed and assigned the worst duties available after he filed the age discrimination case.

12. On February 14, 1998, Complainant received a corrective action for using inappropriate, threatening and unbusiness-like language in an agency-wide meeting on January 8, 1998. (Respondent's Exhibit 6.) Complainant's language and demeanor at the meeting were reported to Mr. Cannedy, after the meeting, by telephone call from Ms. Colanda Morgan, Personnel Director (GJRC). Mr. Cannedy further investigated Complainant's actions by calling Mr. Redozovich, who directed the meeting. It was reported that, in addition to inappropriate comments, Complainant attended the meeting wearing a "camouflage field jacket" and there was some issue about a "pat down" presumably for weapons.

13. In response to the corrective action, Complainant told his supervisor, Mr. Cannedy, that he was simply exercising his First Amendment rights at the meeting, which was an open forum, and that, if given the opportunity, he "would do it again."

14. On March 6, 1998, Complainant received a second corrective action for incorrectly using a time clock, i.e. punching in or out of work in a way that increased agency costs (overtime pay) for which funding was not available. There is a 7 (seven) minute window, early or late, during which an employee must punch in or out, respectively. If an employee punches-in early or punches-out late, without authorization for overtime work, the time clock will automatically consider quarter-hour increments for overtime pay, e.g. if an employee was scheduled to end his or her shift at 7:00 p.m. and punched-out at 7:10 p.m., the clock would indicate payment due for 15 (fifteen) minutes of overtime work up to 7:15 p.m.

15. Prior to issuing the corrective action for time-clock misuse, Mr. Cannedy gave verbal instruction, during two staff meetings which Complainant attended, on how to properly use the time clock. When Complainant did not comply on a majority of days over a month period, Mr. Cannedy issued a confirming memo on the subject which Complainant refused to sign. (Respondent's Exhibit 6.) However, Complainant did properly punch in and out following the issuance of the confirming memo.

16. Complainant disputes the *number* of time-clock violations he made during the months of January and February, 1998. Complainant twice punched-in prior to 7:23 a.m. by 1 (one) minute and on four (4) occasions punched out 1 (one) or 2 (two) minutes after 4:07 p.m. *(See* Respondent's Exhibit 3.)

17. Complainant filed a grievance for the time-clock corrective action. A

meeting was held on April 1, 1998 to discuss the grievance. Mr. Bill Bever, Senior Employee's Representative, Colorado Association of Public Employees (C.A.P.E.) attended the meeting with Complainant.

18. The time-clock (second) corrective action was later "overturned".

19. Also at the meeting on April 1, 1998, Complainant received a third corrective action for his conduct in two (2) separate incidents on two (2) consecutive days:

a) The "Draper Cottage incident" on March *5* and 6, 1998, and

b) The "gasoline incident" on March 6, 1998.

20. In early March, before the Draper Cottage incident, Complainant went to his supervisor and reported that he (Complainant) was aware that there was a rumor going around that he (Complainant) wasn't doing his work correctly. Complainant asked his supervisor, Mr. Cannedy to investigate the matter. However, Mr. Cannedy did not uncover the source of the rumor, if any.

21. On March *5,* 1998 Complainant drove to Draper Cottage and confronted a work crew that was working in a bathroom there, regarding rumors that he (Complainant) wasn't doing his work properly. A temporary worker asked Complainant to leave.

22. There is dispute as to whether Complainant used foul language in his comments at Draper Cottage.

23. The next day, March 6, 1998 Complainant commented to co-workers taking a break in a break room (three of whom had been involved in the Draper Cottage incident the day before) about a news bulletin that an employee in Connecticut had killed his co-workers. At least one employee felt threatened by Complainant's comments. (Respondent's Exhibit *5.)*

24. Complainant did not intend to frighten or intimidate his co-workers. He just thought the news was strange.

25. On March 6, 1998 Mr. Sessum came into Complainant's work area and asked about the smell of gasoline. Complainant responded that it was not the smell of gasoline; it was the smell of diesel, which Complainant was using to clean the concrete floor. When Mr. Sessum insisted that it was the smell of gasoline. Complainant responded, in a confrontational manner, "Got fifty bucks ($50.00)?" or "Would you like to bet fifty buck?"

26. There were no fire suppression mechanisms in the building where the gasoline incident took place.

27. Mr. Sessum was concerned, by the smell of gasoline, for the safety of the building and the workers inside, including Complainant.

28. It was Complainant's practice to clean the concrete floor with diesel fuel.

29. Later, Complainant acknowledge that the smell may have been gasoline from a fuel line in a vehicle on which Complainant was working earlier in the day. Complainant apologized to Mr. Sessum.

30. An R833 meeting, covering both the gasoline incident and the Draper Cottage incident, was held on March 13, 1998. Complainant was represented by Mr. Bill Bever of the Colorado Association of Public Employees (C.A.P.E.). (Respondent's Exhibit 7, for limited purposes of impeachment.)

31. In recommending a third corrective action, Complainant's supervisor, Mr. Cannedy, considered that Complainant's actions detracted from the ability of coworkers to perform their duties by taking up coworkers' time and attention.

32. In deciding to issue a third corrective action, Mr. Sessum considered investigative interviews with Complainant and the other employees involved in the Draper Cottage incident and the fact that Complainant's version of the facts conflicted with other reports of the incident. Mr. Sessum chose to impose a corrective action, rather than a disciplinary action, because he knew there was "paranoia" in the workplace about the change in management and he wanted to give Complainant and Mr. Cannedy time to "work things out".

33. Mr. Bill Bever, Senior Employee's Representative for the Colorado Association of Public Employees, acknowledges that there was a significant increase in inquiries to his office after the change in management.

34. Complainant argues that as part of the "Good guy/bad guy" atmosphere, he was often provoked by his supervisors, including the filing of numerous corrective actions and that Mr. Cannedy and Mr. Sessum often laughed at him.

35. Mr. Sessum, the appointing authority, and Mr. Cannedy, Complainant's supervisor feared a violent response from Complainant at the time Complainant was made aware of the third corrective action. Therefore they set up a meeting with Complainant in order to advise him of the third corrective action. The meeting took place on April 3, 1998. When he was told of the third corrective action Complainant first refused to say anything. Then Complainant made "threats" against his supervisor, e.g. threats to sue (to file a law suit).

36. There is dispute as to whether Complainant said, to Mr. Sessum, “You’ll be laughing out of the other side of your head” or ~‘You’l1 be laughing out of the back of your head” which was perceived by Mr. Sessum as a threat of physical harm, versus “You’ll be laughing out of the other side of your face” referring to Mr. Sessum’s laughter at Complainant and intended to communicate something similar to “You’ll see”.

37. Complainant denies ever making any statements that physically threatened anyone. At hearing Complainant argued that his comments, made at both the April 1, 1998 and the April 3, 1998 meetings were understandable and, though the comments may have been embarrassing, they were not threatening. (Complainant’s Exhibit B.)

38. Complainant’s co-worker, Mr. Mark Peck, states that Complainant is outspoken but has good work habits, e.g. Complainant punches-in and goes immediately to work. Mr. Peck has never seen Complainant act in an inappropriate way or threaten anyone.

39. Mr. Peck states that, after the change in management in November 1997, there were many changes in the overall work environment including a “double standard” under which some employees were not treated as well as others, i.e. those that get along with Mr. Sessum have no accountability, while those that do not get along with Mr. Sessum must “follow rules to the letter”.

40. Complainant’s co-worker, Mr. Jim Cook, states that Complainant “speaks his mind” but is a dedicated worker, in spite of the disarray that has existed since the change in management.

41. An R833 meeting was convened to look into Complainant’s threats against his supervisors.

42. Prior to the threats which gave rise to the (second) R833 meeting in this matter, Mr. Sessum met with Complainant, individually and in a group, on a number of occasions. However, he had no knowledge of Complainant’s work history or anything, positive or negative, about Complainant himself

43. A second R833 meeting was held on April *13,* 1998. Complainant was represented by Mr. Bill Bever of the Colorado Association of Public Employees (C.A.P.E.). Complainant refused to say anything at the R833 meeting and there was an issue regarding his demeanor, e.g. he refused to remove his sunglasses. (Respondent’s Exhibit 2.)

44. Complainant first expressed frustration about rumors to his supervisor, which then became anger (the Draper Cottage incident) and later became withdrawal (Complainant’s refusal to speak at R833 meetings).

45. Mr. Bever observed that Mr. Sessum's demeanor during the R833 meeting was condescending and humiliating. The effect of Mr. Sessum's attitude and manner in the workplace had the effect of demoralizing Complainant.

46. After the R833 meeting, Complainant submitted additional written information for consideration by the appointing authority, Mr. Sessum. (Complainant's Exhibit B.)

47. Complainant was advised, by letter, of Mr. Sessum's decision to impose discipline. (Respondent's Exhibit 1.)

48. In deciding to impose discipline, Mr. Sessum found that Complainant's statements were threatening. As the appointing authority, Mr. Sessum considered prior corrective actions including a 1996 counseling memo, a restraining order in effect against Complainant (restraining him from contact with a co-worker), the February 14, 1998 corrective action and the May *5,* 1998 corrective actions. The appointing authority considered Complainant's past evaluations and Complainant's demeanor in the R833 meeting. The appointing authority also considered the fact that neither of the corrective actions had the desired effect of changing Complainant's behavior (actions).

49. In deciding to impose discipline in this matter, the appointing authority considered alternative discipline, including termination, and chose what he believed to be a very minor form of discipline, i.e. a two (2) step reduction in pay for a period of two (2) months, April 27, 1998 through June 26, 1998.

50. The appointing authority's decision to impose a two (2) step reduction in pay for a period of two (2) months was within the alternatives available to the appointing authority and, viewing the totality of the circumstances, was reasonable

51. Complainant's P.A.C.E. evaluation for the same period of time gave him an overall rating of "Good".

52. Complainant argues that the number of corrective actions and the disciplinary action in this matter are harassment and a pattern and practice of discrimination based on age.

53. Complainant did not indicate discrimination in his appeal to the State Personnel Board, nor did he argue age discrimination at hearing.

54. Complainant's demeanor during hearing included audible laughter, perhaps in disbelief of the testimony of others, and an apparent attitude of contrariness.

DISCUSSION

In a disciplinary termination case the burden is upon the Respondent to prove by a preponderance of the evidence that the acts, on which the discipline was based, occurred and that just cause warrants the discipline imposed. *Department of Institutions v. Kinchen,* 886 P.2d 700 (Colo. 1994). The administrative law judge, as the trier of fact, must determine whether the burden of proof has been met. *Metro Moving and Storage Co. v.* Gussert, 914 P.2d 411 (Colo. App. 1995).

In this case Complainant does not deny that he made perhaps rude statements in an agency-wide open forum on January 8, 1998. He simply states that it was his right to make such statements as a matter of First Amendment privileges. Complainant does not deny challenging co-workers at Draper Cottage on March *5,* 1998 though he does deny using foul language.

Complainant does not deny reporting to his own co-workers that a Connecticut employee had just killed his co-workers. However, he denies that he intended to frighten them or intimidate them. Complainant does not deny challenging Mr. Sessum about the smell of gasoline and he does not deny threatening to sue both Mr. Sessum and Mr. Cannedy. However, Complainant states that the comment about "laughing out of the other side of your face" was not a threat. It is clear that Complainant "speaks his mind." However, it is also clear that he does not understand the effects of his demeanor and comments on others, i.e. he does not seem to understand that the things he says and the way he says them frighten other people including co-workers.

Complainant's people-skill problems seem to be magnified by the "paranoia" surrounding the change of management which occurred in November 1997, i.e. because Complainant speaks his mind, he becomes the voice of opposition for those employees who do not like the new procedures. Both Mr. Cannedy and Mr. Sessum, aware of the concerns regarding change in management, have attempted to "work things out" through meetings, with individuals and groups, and through progressive discipline. However, Mr. Cannedy is seriously lacking the experience necessary to make significant changes quickly and the fact that he worked at the Grand Junction Regional Center (GJRC), as a plumber, before he became a supervisor may put him at more of a disadvantage than an advantage.

Mr. Sessum's condescending attitude and attempts to make quick changes have given him a reputation that appears to have increased the factionalization of GJRC employees rather than foster cooperation. Additionally, comments made by Complainant to Mr. Sessum ("the gasoline incident") and threats made by Complainant, e.g. to sue or "You'll be laughing out of the other side of your face", were the subject of two R833 meetings. It would seem that Mr. Sessum would remove himself from acting as the appointing authority for matters in which he was involved. However, conflict of

interest was not argued or even addressed at hearing.

Instead, it up to this administrative law judge to determine whether just cause warrants the discipline imposed for the actions which Complainant admits, i.e. does the fact that Complainant did not intend to offend or frighten anyone sufficiently mitigate his actions so that just cause does not warrant the discipline imposed? In this case, no. The Complainant cannot "speak his mind" to co-workers, offend them or frighten them and avoid the consequences simply because he did not intend to offend or frighten. There are limits to First Amendment rights and a cooperative work environment is an appropriate goal for management. In this case, discipline was progressive, starting with a confirming memo and corrective actions. When the corrective actions did not have the desired effect, discipline - in form of a six month pay reduction - was imposed.

In this case, the appointing authority could have terminated Complainant's employment for what were perceived to be threats of physical harm: "the Draper Cottage incident", the report of a Connecticut murder of co-workers and comments such as, "You'll be laughing out of the other side of your face" can a!! be very intimidating, no matter how they were intended. Complainant must conform his behavior to what is acceptable for the work p!ace for face a more severe form of discipline.

CONCLUSIONS OF LAW

1. Complainant challenged and/or frightened co-workers about rumors in "the Draper Cottage incident" and by making comments regarding the Connecticut murders of co-workers. He made comments that were perceived as threats to his supervisors.

2. Complainant did not intend to frighten or offend co-workers. Nonetheless, his comments had that effect. Therefore discipline was warranted. A six (6) month reduction in pay was an available option for discipline and is reasonable under such circumstances.

3. In disciplining Complainant for comments made to co-workers, Respondent did not act arbitrarily, capriciously or contrary to rule or law.

4. Complainant is <u>not</u> entitled to costs including attorneys fees.

ORDER

The actions of Respondent are **affirmed**.

Dated this 2nd day
of November, 1998
at Denver, Colorado

_____
Michael S Gallegos
Administrative Law Judge

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** was place in the United States mail, postage pre-paid, addressed as follows:

Ms. Vonda G. Hall
1390 Logan Street, Suite 402
Denver, Colorado 80203

and in the interoffice mail to:

Ms. Stacy L. Worthington
Assistant Attorney General
1525 Sherman St., 5th Floor
Denver, Colorado 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 1OA C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado,793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v.. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is $50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record must make arrangements with a disinterested recognized transcriber to prepare the transcript. The party should advise the transcriber to contact the Board office to obtain the hearing tapes. In order to be certified as part of the record on appeal the original transcript must be submitted to the Board within 45 days of the date of the notice of appeal is filed. It is the responsibility of the party requesting a transcript to ensure that any transcript is timely filed. If you have any questions or desire any further information contact the State Personnel Board office at (303) 866-3244.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.